TEO HOCK GUAN & ANOR.

v.

JOHORE BUILDERS & INVESTMENTS SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATUK MOKHTAR SIDIN J
[CIVIL APPEAL NO: J-02-213 OF 1994]
27 MAY 1996

CONTRACT: *Building contract - Delay in completion of houses - Recovery of liquidated damages - Principles - Proprietor ordering additional works - Whether additional works contributed to delay - Whether proprietor disabled from recovering liquidated damages - Whether time ceased to be of the essence.*

CIVIL PROCEDURE: *Witnesses - Examination of - Failure to raise vital point during cross-examination of witness - Whether could have any adverse effect - Whether meant that vital point was not part of the defendants' case.*

CIVIL PROCEDURE: *Fresh evidence - Application to adduce fresh evidence before Court of Appeal - Issue in respect of which fresh evidence sought to be adduced never arose for determination in the Court below - Whether admissible - Whether could be allowed.*

By an agreement executed in 1981, the appellants undertook to construct 90 units of houses for the respondent, and to complete construction thereof by 11 June 1982. Clause 27 of the agreement stipulated that upon delay, the respondent was entitled to liquidated damages at the rate of RM50 per day per house. Construction of the houses was delayed, and following a claim by the respondent, the learned Judge ordered that the appellants pay liquidated damages amounting to RM2,461,750. The appellants appealed. At the outset, the appellants sought leave to adduce fresh evidence pertaining to their changed partnership status, apparently to show that it was improper for the respondent to sue them as a firm. The issue as to their capacity, however, had never arisen in the Court below. This apart, they also contended that the learned Judge was wrong in awarding the damages as time had ceased to be of the essence.

It was not in dispute that, in the course of constructing the houses, upon the respondent's request, the appellants had carried out some extra works. The works were quite separate from the work contracted for and consequently, separate payments therefor had been made by the respondent. The appellants nonetheless contended that the extra works had caused the delay, with the

result that time could no longer be of the essence and the respondent, therefore, was not entitled to receive the liquidated damages. The facts however showed that, while cross-examining the respondent's witness, the appellants had not put any suggestion that the delay was caused by the extra works.

Before the learned appeal Judges, the primary questions that arose were:

(i) whether the application to adduce fresh evidence, in the circumstances, could be allowed.

(ii) whether the appellants' failure to put the question to the respondent's witness as to the cause of delay aforesaid was fatal to their contention that the delay was caused by the extra works.

Held:

[1] Leave to adduce fresh evidence ought to be refused. Nowhere in their defence did the appellants plead the fact that they were merely partners of the firm at the date of the action but not when the liability accrued. The fresh evidence was therefore being sought to be put in on a matter that had not arisen in the Court below. It was therefore irrelevant and for that reason, inadmissible. Further, the evidence in question was also available at the trial.

[2] There is no merit in the contentions of the appellants. There was in the present case an express provision in the contract for the calculation of the damages that were to be paid for the period of delay. The facts also showed that the extra works were quite separate from the works contracted for and therefore had no nexus to the claims in question. These apart, there was no evidence and no allegation made that the delay had been caused by the extra works.

[3] The appellants, while cross examining the respondent's witness, had not raised the point of delay or that the extra works had caused the delay. This being the case, the learned Judge was entirely right in ignoring the point. In the absence of a suggestion that the delay had been caused by the so called extra works, the Judge was entitled to proceed upon the basis that the appellants were no longer advancing this as a reason for delay.

[4] This is a case which turns upon the findings of primary fact made by a Judge based upon the credibility of witnesses whom he had seen and heard and upon the undisputed material presented to him. This Court accepts those findings and there is abundant evidence on record to support

the findings. The appellants, on their part, had singularly failed to demonstrate any error on the part of the learned Judge.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Kontrak bangunan - Kelewatan menyiapkan rumah-rumah - Mendapatkan semula gantirugi jumlah tertentu - Prinsip-prinsip - Tuanpunya mengarahkan kerja-kerja tambahan - Samada kerja-kerja tambahan menyumbang kepada kelewatan - Samada tuanpunya dijadikan tidak layak untuk mendapatkan semula gantirugi jumlah tertentu - Samada masa tidak lagi menjadi penting.*

***PROSEDUR SIVIL:** Saksi-saksi - Pemeriksaan - Kegagalan untuk membangkitkan perkara-perkara penting ketika pemeriksaan-balas saksi-saksi - Samada mungkin mempunyai kesan yang memudaratkan - Samada membawa kesan bahawa perkara-perkara penting itu bukannya sebahagian daripada kes defendan.*

***PROSEDUR SIVIL:** Keterangan baru - Permohonan hendaklah mengemukakan keterangan baru di hadapan Mahkamah Rayuan - Isu berhubung dengan yang mana keterangan baru cuba untuk dikemukakan tidak pernah dibangkitkan untuk penentuan dalam Mahkamah di bawah - Samada boleh diterima - Samada boleh dibenarkan.*

Melalui satu perjanjian yang disempurnakan pada tahun 1981, perayu-perayu mengakujanji untuk membina 90 buah unit rumah untuk responden dan menyiapkannya selewatnya pada 11 Jun 1982. Fasal 27 perjanjian menetapkan bahawa sekiranya berlaku kelewatan, responden adalah berhak kepada gantirugi jumlah tertentu pada kadar RM50 sehari setiap rumah. Kelewatan terhadap pembinaan rumah-rumah tersebut telah berlaku, dan berikutan dengan satu tuntutan oleh responden, Hakim yang bijaksana telah memerintahkan supaya perayu-perayu membayar gantirugi jumlah tertentu yang berjumlah sebanyak RM2,461,750. Perayu-perayu telah merayu. Pada mula-mula lagi, perayu-perayu cuba memohon kebenaran untuk mengemukakan keterangan baru berhubung dengan status perkongsian mereka yang berubah, yang nampaknya untuk menunjukkan bahawa ianya tidak wajar bagi responden untuk mendakwa mereka sebagai sebuah firma. Isu berhubung dengan kedudukan mereka, walaubagaimana pun, tidak pernah berbangkit dalam Mahkamah di bawah. Selain itu, mereka juga menegaskan bahawa Hakim yang bijaksana tersebut salah dalam memberikan gantirugi kerana masa tidak lagi merupakan intipati.

Ianya tidak dipertikaikan bahawa, dalam perjalanan pembinaan rumah-rumah tersebut, atas permintaan responden, perayu-perayu telah menjalankan kerja-kerja tambahan. Kerja-kerja tersebut adalah agak berlainan daripada kerja-kerja yang dikontrakkan dan akibatnya, pembayaran-pembayaran yang berasingan

telah dibuat oleh responden. Perayu-perayu namun begitu menegaskan bahawa kerja-kerja tambahan itu telah menyebabkan kelewatan, yang mana akibat daripadanya, masa tidak lagi menjadi intipati dan responden, dengan itu, tidak berhak untuk menerima gantirugi jumlah tertentu tersebut. Fakta-fakta walaubagaimanapun menunjukkan bahawa ketika memeriksa balas saksi responden, perayu-perayu telah tidak menyarankan bahawa kelewatan tersebut telah disebabkan oleh kerja-kerja tambahan itu.

Di hadapan Hakim-Hakim rayuan yang bijaksana, persoalan utama yang berbangkit adalah:

(i) samada permohonan untuk mengemukakan keterangan baru, dalam keadaan disini, boleh dibenarkan.

(ii) samada kegagalan perayu untuk mengemukakan soalan kepada saksi responden berhubung dengan sebab kelewatan sepertimana yang dinyatakan di atas memudaratkan penegasan mereka bahawa kelewatan tersebut telah disebabkan oleh kerja-kerja tambahan tersebut.

Diputuskan:

[1] Kebenaran untuk mengemukakan keterangan baru seharusnya ditolak. Perayu-perayu telah tidak di mana-mana dalam pembelaan mereka memplid fakta bahawa mereka hanyalah rakan kongsi firma tersebut pada tarikh tindakan tetapi bukan ketika tanggungan itu terakru. Keterangan baru adalah dengan itu cuba dipohon untuk dikemukakan dalam perkara yang telah tidak dibangkitkan dalam Mahkamah di bawah. Ianya dengan itu adalah tak relevan dan atas alasan itu, tidak boleh diterima. Seterusnya, keterangan yang dipersoalkan juga terdapat di perbicaraan tersebut.

[2] Tidak terdapat apa-apa merit dalam penegasan perayu-perayu. Terdapat dalam kes semasa ini satu peruntukan nyata dalam kontrak tersebut bagi pengiraan gantirugi yang harus dibayar bagi tempoh kelewatan tersebut. Fakta-fakta juga menunjukkan bahawa kerja-kerja ekstra tersebut adalah agak berasingan daripada kerja-kerja yang-kerja yang dikontrakkan dan dengan itu tidak mempunyai apa-apa nexus kepada tuntutan yang dipersoalkan. Selain ini, tidak terdapat keterangan dan tiada pengataan telah dibuat bahawa kelewatan tersebut telah disebabkan oleh kerja-kerja ekstra tersebut.

[3] Perayu-perayu ketika memeriksa balas saksi responden, telah tidak membangkitkan perkara kelewatan atau bahawa kerja-kerja ekstra itu telah menyebabkan kelewatan. Oleh kerana keadaannya sedemikian, Hakim yang bijaksana sesungguhnya betul dalam tidak menghiraukan perkara itu. Dalam ketiadaan saranan bahawa kelewatan tersebut telah disebabkan oleh kerja-kerja ekstra yang dikatakan itu, Hakim adalah berhak untuk meneruskan perbicaraan atas dasar bahawa perayu tidak lagi mengemukakan perkara ini sebagai alasan bagi kelewatan.

[4] Ini merupakan satu kes yang bergantung kepada keputusan fakta utama yang dibuat oleh seorang Hakim berdasarkan keboleh-percayaan saksi-saksi yang telah beliau lihat dan dengar dan di atas bahan-bahan yang tidak dipertikaikan yang telah dikemukakan kepadanya. Mahkamah ini menerima keputusan-keputusan itu dan terdapat keterangan yang terlalu banyak dicatat untuk menyokong keputusan tersebut. Perayu-perayu dipihak mereka sendiri pula, benar-benar gagal untuk menunjukkan apa-apa kesilapan di pihak Hakim yang bijaksana.

[Rayuan dibenarkan]

Cases referred to:
Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(refd)***
SMK Cabinets v. Hili Modern Electrics Pty Ltd. [1984] VR 391 ***(refd)***
Aik Ming (M) Sdn. Bhd. & Ors. v. Chang Ching Chuen & Ors. [1995] 2 MLJ 770 ***(refd)***

For the appellants - M. Pathmanathan (RA Kumar with him); M/s. Rina Noor & Co.
For the respondent - Syed Ahamad Sadik; M/s. C.S. Tam & Co

JUDGMENT

Gopal Sri Ram JCA:

The appellants before us were the defendants in the Court below. The respondent was the plaintiff. We will, for convenience, refer to them throughout this judgment as plaintiff and defendants.

On 8 October 1994, the High Court at Johor Bahru entered judgment in the plaintiff's favour for the sum RM804,800 together with interest and costs. The defendants had, in the action brought by the plaintiff, delivered a defence and counterclaim. The learned Judge who tried the action entered judgment on the counterclaim for a sum of RM63,375. This appeal is directed only against so much of the learned Judge's judgment as found for the plaintiff. There is no cross-appeal by the plaintiff against the award made on the counterclaim.

Before dealing with the facts as are relevant to the appeal, there is one matter we may dispose of quite shortly.

At the commencement of the appeal, the defendants moved this Court for leave to adduce further evidence on the issue of the capacity in which the defendants had been sued. This is the way which Counsel put it. The statement of claim alleged that the defendants were trading as a firm. That may have been true when the action was commenced. But there was no plea that the defendants were partners at all material times. In truth they had been sued in their individual capacity. It was now proposed to adduce evidence to show that the defendants were not partners when the alleged liability accrued. So much for the argument.

We refused leave to adduce further evidence on two main grounds. First, nowhere in their defence did the defendants plead the fact that they were merely partners of the firm at the date of the action but not when the liability accrued. Had they done so, it would have become necessary for the trial Judge to determine that issue. But nothing of the sort was ever done. The issue was one which never arose for determination. The fresh evidence was therefore being sought to be put in on a matter that had not arisen in the Court below. It was therefore entirely irrelevant, and, for that reason, inadmissible.

Second, Counsel for the defendants before us frankly conceded that the evidence in question was available at the trial. Yet it was not put in. It follows therefore that one of the vital conditions upon which is dependent the exercise of discretion by an appellate Court to permit fresh evidence was absent. (See, *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70). The evidence, even if relevant (which is not the case), was not, on the basis of the exercise of discretionary power, admissible.

With that we now turn to consider the background of the factual matrix against which this appeal arose. This has been dealt with at length and with great care by the learned Judge. We therefore find it quite sufficient for this purpose to extract the relevant passages from his judgment.

> The plaintiffs' claim against the defendants is for a sum of RM2,461,750 being liquidated damages for the delay in completing 90 units of dwelling houses.
>
> The plaintiffs alleged that by a written agreement dated 11 August 1981, the defendants contracted with the plaintiffs to provide labour for masonary, carpentry and steel bending for the construction of 90 units of dwelling houses to be erected on Taman Sri Setia in Johore Bahru. The 90 units of houses were to be completed within 10 months from date of the agreement, which was 11 June 1982. According to the plaintiffs, the defendants failed to do so, and under clause 27 of the agreement, is entitled to liquidated damages of RM50 per day per house. To support this claim for, RM2,461,750, the plaintiffs based their calculation on the completion of the said house according to a chart, tendered in evidence as P6.
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> The defendants' defence asserted that they have completed 46 units on the 31 January 1983 and 44 units on the 31 March 1983. Further they alleged that the plaintiffs had breached the agreement by *inter alia:*
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> (a) failing to plant relevant boundary stones on the site for 2 months after the date of the agreement;
>
> (b) delaying the supply of various raw materials to enable the defendants to proceed with their work;
>
> (c) requesting the defendants to carry out additional and extra work;

all of which caused the delay in the completion of the houses on the stipulated date.

The defendants also alleged that the plaintiffs have failed to deduct for rainy days and the days affected by the Chinese New Year celebration.

Besides the defence, the defendants are also making a counter-claim for:

(a) a sum of RM63,375 being a sum detained by the plaintiffs for the works completed under agreement together with interest;

(b) RM12,556.50 being outstanding balance sum due to the defendants by the plaintiffs for additional works carried out by the defendants for the plaintiffs;

(c) damages, interest & cost.

After having considered the evidence tendered in this case, I make the following findings:

(1) The 90 units of houses were completed on (a) 31 January 1983 for 46 units and (b) on 31 March 1983 for 44 units. This is as stated in paragraph 6 of the Statement of Defence which was never denied or traversed upon by the plaintiffs in their reply and defence to counter-claim. As such it is deemed to be admitted by the plaintiffs. In addition to this, PW1, the chief executive of the plaintiffs admitted in evidence that he thought the houses were completed by the defendants 'sometime in January 1983'. Such being the case, the dates tendered by the defendants should be correct.

(2) Flowing from the above, the claim by the plaintiffs based on dates stated in P6 cannot be accepted. The dates in P6 used for calculation of late delivery of the houses were, as admitted by PW2 based on architect's certificate of completion. Before such certificate can be issued, the whole house including painting and other works not involving the defendants must be completed. As the defendants were not responsible for any other works except those mentioned in the agreement, and delay in the issuance of the architect's certificate that may be due to the fault of others cannot be attributed to defendants.

The learned Judge, having subjected the evidence and the rival claims by the parties to careful scrutiny, concluded as follows.

This Court finds that:

(1) There is a delay of 234 days (from 11 June 1982 to 31 January 1983) for completing 46 units of houses by the defendants. From this a deduction of 84 days (54 for rainy days and 30 days for delay in pecking of boundary stones) should be allowed. This gives a balance of 150 days delay. As each day's delay is RM50, for 150 days it would be RM50 x 150 = RM7,500 per unit. As there are 46 units, the total sum of RM345,000 (46 x RM7,500) should be awarded as liquidated damages against the defendants under this item.

(2) There being a delay of 293 days (from 11 June 1982 to 31 March 1983) for completing 44 units of houses by the defendants. From this, a deduction of 84 days (54 for rainy days and 30 days for delay in pecking of boundary stones) should be allowed. This gives a balance of 809 days delay. As each day's delay is RM50, for 209 days it would be RM50 x 209 = RM10,450 per unit. As there are 44 units, the total sum of RM459,800 (44 x RM10,450) should be awarded as liquidated damages against the defendants under this item.

(3) The total of (1) and (2) above is RM804,800.

The plaintiffs' claim is therefore allowed for RM804,800 with interest at 8% per annum from date of this judgment to date of realisation. This Court also allows cost to the plaintiffs.

As there is no set-off pleaded by the defence, this Court allows the defendants' counter-claim of RM63,375 with interest of 8% per annum on judgment sum from date of filing counter-claim to date of realisation. This Court also allows cost for the defendants' counter-claim.

Before us, the findings made by the learned Judge in the plaintiff's favour were attacked on the ground that the learned Judge overlooked a matter that was vital upon the issue of delay. It is that the plaintiff had requested to undertake additional works on the project in question. As a result, time ceased to be of the essence and the plaintiff was not entitled to receive any liquidated damages whatsoever under the agreement between the parties.

In support of the proposition that time ceases to be of the essence under a building contract when additional works are ordered and undertaken, Counsel cited and relied on the decision of the Full Court of Victoria in *SMK Cabinets v. Hili Modern Electrics Pty Ltd.* [1984] VR 391, where all the relevant authorities upon the subject have been usefully collected and discussed. For present purposes, it is sufficient to quote from that portion of the headnote to the report which accurately sets out the principles. It reads as follows:

(1) Under a building contract, the proprietor cannot recover liquidated damages from the contractor for delay in completion where the proprietor himself delays completion by ordering extras or other variations, unless the contract makes it clear that the contractor is undertaking to complete by the due date notwithstanding extras or other variations or unless resort can be had to an appropriate extension of time clause.

(2) The ordering of variations after the due date for completion which substantially delays completion will, unless the contract provides otherwise, and in the absence of an applicable extension of time clause, disable the proprietor from recovering or retaining liquidated damages which might otherwise have accrued after the giving of the order, although the proprietor's rights in respect of amounts already accrued by way of liquidated damages will not be affected.

Anderson v. Tuapeka County Council [1900] 19 NZLR 1; *Baskett v. Bendigo Gold Dredging Co Ltd.* [1902] 21 NZLR 166, referred to.

(3) Unless the contract provides otherwise, liquidated damages for delay in completion cannot be recovered by the proprietor where the ordering of extras or other variations causes or contributes to the delay in completions, notwithstanding that the contractor may in fact have disabled himself by his own delays from completing by the due date.

It is axiomatic that for this principle of law to apply, there must first be in existence a substratum of facts, the existence of which is postulated by the principle. Absent such facts, and the proposition becomes quite irrelevant.

Counsel for the plaintiff before us, in opposing the applicability of the principle relied upon by the defendants, cited three circumstances that exclude its operation. First he says that there is in the present case, an express provision in the contract between the parties for the calculation of the damages that are to be paid for the period of delay.

Second, Counsel has referred us to the evidence in the record provided and relevant to the topic under discussion which supports the conclusion that the extra work spoken of by the plaintiffs were quite separate from the works contracted for. Payment for these works was separately made. The so-called extra works have therefore no nexus whatsoever with the claims that were presented to the Judge.

Third, Counsel has drawn our attention to the absence of any suggestion during the cross-examination of the plaintiffs witness to the effect that the delay had been caused by the extra work. Since the point was of such critical importance to the defendant, it ought to have been put to the plaintiffs' witness during cross examination. Failure to do so would have an adverse effect upon the defendants' case. It would mean that it was not part of their case that the delay had been occasioned by the ordering and the execution of the so-called extra works.

Having given much consideration to the arguments addressed to us, by both Counsel, we came to the conclusion that there is much force in the submissions made by Counsel for the plaintiffs. For the reasons advanced by him and adverted to a moment ago, we were of the opinion that there was no merit in the argument advanced by Counsel for the defendants.

In our judgment, the learned Judge was entirely right in ignoring the point because it was not pursued under cross-examination of the plaintiff's witness. In the absence of a suggestion that the delay had been caused by the so-called extra works, the Judge was entitled to proceed upon the basis that the defendants were no longer advancing this as a reason for the delay. The effect of a party failing to put its case squarely to its opponent's witness has been sufficiently addressed by this Court in *Aik Ming (M) Sdn. Bhd. & Ors. v.*

Chang Ching Chuen & Ors. [1995] 2 MLJ 770, 794, and we find it unnecessary to repeat what was there said.

At the end of the day, this is a case which turns upon the findings of primary fact made by a Judge based upon the credibility of witnesses whom he had seen and heard and upon the undisputed material presented to him. We accept those findings without any reservation. Indeed, we find that there is abundant evidence on record to support those findings.

In these circumstances, we, sitting here as an appellate Court, must, and do, respectfully defer to the views expressed by the learned Judge. The defendants have singularly failed to demonstrate any error on the part of the learned Judge.

For these reasons, the appeal was dismissed with costs. All orders made by the learned Judge were affirmed. The deposit paid into Court by the defendants was ordered to be paid out to the plaintiff to account of its taxed costs.

Reported by W.A. Sharif